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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 382

Z. & F. ASSETS REALIZATION CORPORATION, a Delaware Corporation; AMERICAN-HAWAIIAN STEAMSHIP COMPANY, Intervener,

Petitioners,

v.

CORDELL HULL, Secretary of State, and HENRY MORGENTHAU, Secretary of the Treasury; LEHIGH VALLEY RAILROAD COMPANY, Intervener,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF THEREON.

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American-Hawaiian Steamship Company.

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PETITION.

The American-Hawaiian Steamship Company, a corporation organized under the laws of New Jersey, respectfully petitions the Supreme Court of the United States to grant a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia rendered in the above entitled cause (No. 7596 in that Court), affirming a decree of the District Court of the United States for the District of Columbia entered on January 6, 1940 (R. 298).

NATURE OF THE CASE.

The present case involves a conflict of rights asserted by American claimants with reference to a fund on deposit in the Treasury Department. The judicial determination of

those rights requires, in the first place, an interpretation of an important Federal statute and, in the second place, an interpretation of important international covenants, which were effectuated by the statutory provisions. The fundamental question raised by the decision of the Court of Appeals is whether judicial action with respect to these questions is precluded by a proper application of principles of constitutional law pertaining to "political" questions.

The plaintiff and the intervener-plaintiff asked for an injunction to restrain the Secretary of State from certifying and to restrain the Secretary of the Treasury from paying some awards said to have been rendered recently by the so-called Mixed Claims Commission, established under an agreement concluded by the United States and Germany on August 10, 1922 (R. 12, 31). Such payments would exhaust the funds in the Treasury available for the payment of awards in accordance with the Settlement of War Claims Act of March 10, 1928, 45 Stat. 254, and leave unpaid awards made many years ago in favor of the plaintiff and in favor of the intervener-plaintiff.

It is shown in the plaintiff's complaint that it is the holder of awards rendered some years ago by the Commission created by the Agreement of August 10, 1922, and that there is an unpaid balance of these awards (R. 3). It is shown by the intervener-plaintiff that it is the holder of awards likewise rendered some years ago by the Commission, and that there is an unpaid balance (R. 23).

It is alleged in the complaint filed by each that the Lehigh Valley Railroad Company and others similarly situated presented claims to the Commission; that they were disallowed by a decision of the two Commissioners, the Umpire participating in 1930; that about nine years later these claimants representing themselves to be holders of awards in their cases desire to have them paid; and that these awards are not awards of the Commission, since only one Commissioner was on the Commission at the time they were rendered, and that the dismissal of the claims in 1930 is a final and binding decision.

The plaintiff brought this action to protect property rights in funds on deposit in the Treasury of the United States amounting to approximately $24,000,000 (R. 8). Those rights and the rights which the intervener-plaintiff undertook to protect are substantially identical. The rights have their foundation in (1) treaty stipulations concluded by the United States and Germany; (2) provisions of an agreement between the two countries to give effect to those treaty stipulations; and (3) statutory provisions enacted by Congress to give effect to both the treaty stipulations and the provisions of the supplemental agreement.

The Treaty of Versailles embodied many detailed provisions obligating the Government of Germany to pay war indemnities to the governments with which Germany had been at war, called the Allied and Associated Powers, and in favor of their nationals. Among those provisions were some authorizing the Allied and Associated Powers to retain and liquidate, and to apply to specified classes of claims, property within their respective jurisdictions belonging to German nationals.

The Government of the United States did not ratify the Treaty of Versailles, but on August 25, 1921, it concluded a separate treaty with Germany (42 Stat. Pt. 2, 1939) which secured to the United States and in favor of its nationals all the rights with regard to indemnities stipulated in the Treaty of Versailles, and, further, all rights, privileges, and indemnities specified in the Joint Resolution of the Congress of the United States of July 2, 1921 (42 Stat. 105).

For the purpose of giving effect to provisions of the Treaty of August 25, 1921, with regard to compensation to be paid to American citizens for injuries suffered with respect to rights of person and property, the United States and Germany concluded the Agreement of August 10, 1922, which established the Commission, which was charged with the duty of determining the total amount to be paid by Germany in satisfaction of indemnities due to the United States and its citizens by virtue of provisions of the Treaty of August 25, 1921.

See Article I for the categories of claims of *citizens* to be passed upon by the Commission (R. 16).

Article II of the agreement reads as follows:

> "The Government of the United States and the Government of Germany shall each appoint one commissioner. The two Governments shall by agreement select an umpire to decide upon any cases concerning which the commissioners may disagree, or upon any points of difference that may arise in the course of their proceedings. Should the umpire or any of the commissioners die or retire, or be unable for any reason to discharge his functions, the same procedure shall be followed for filling the vacancy as was followed in appointing him."

Article VI reads in part as follows:

> "The decisions of the commission and those of the umpire (in case there may be any) shall be accepted as final and binding upon the two Governments."

Section 2 of the so-called Settlement of War Claims Act of March 10, 1928, 45 Stat. 254, reads in part as follows:

> "Sec. 2(a) The Secretary of State shall, from time to time, *certify* to the Secretary of the Treasury the awards of the Mixed Claims Commission, United States and Germany, established in pursuance of the Agreement of August 10, 1922, between the United States and Germany (referred to in his Act as the 'Mixed Claims Commission'). (Italics inserted.)
>
> "(b) The Secretary of the Treasury is authorized and directed to pay an amount equal to the principal of each award so certified, plus the interest thereon, in accordance with the award, accruing before January 1, 1928."

Copies of the so-called awards have already been certified by the Secretary of State to the Secretary of the Treas-

ury. That was done after the plaintiff filed its complaint and evidently just before process was served on the Secretary of State. The Marshal endeavored to serve the Secretary through service on the legal adviser for the Department of State on the morning of October 31, 1939, but was unsuccessful. The legal adviser's assistant suggested that service on Mr. Hackworth, the legal adviser, be postponed until the following day, and the Marshal it seems temporarily abandoned his efforts to make service, which was made on the afternoon of October 31 (R. 317). The necessary certificates covering the great number of so-called awards were sent to the Secretary of the Treasury on that day (R. 63-73, 110, 333).

Decision of the District Court.

Mr. Justice Bailey of the District Court held that the issuance of the certificates by the Secretary of State rendered the Court powerless to control the Secretary of the Treasury, and therefore powerless to prevent the payment of the claims to the Lehigh Valley Railroad Company and others. Mr. Justice Bailey referred to the contention of the plaintiff, that the so-called awards were not made by the Commission as the Commission could not function, since one of the Commissioners had resigned, and Mr. Justice Bailey expressed the opinion that that was the plaintiff's strongest contention. However, he declared the claims to be claims of the United States, and he expressed the opinion that Congress had vested the Secretary of State with authority to pass on the question at issue, and whether he decided rightly or wrongly, the Court could not act (R. 295). The trial court's decision evidently was grounded on its interpretation of provisions in the Settlement of War Claims Act of 1928 relating to the functions and the extent of authority vested by that law in the Secretary of State.

Decision of the Court of Appeals.

The Court of Appeals affirmed the decision of the District Court based on an interpretation of the Settlement of War Claims Act of 1928. But the Appellate Court, in affirming the decision of the lower Court, undertook to dispose of the case by application of principles of constitutional law relating to distinctions between functions of the Judicial Department of the Government and functions of the Executive Department.

The Appellate Court's decision is grounded on the theory that the disposition of the case "involves a political and not a judicial question". The decision appears to be based on two fundamental propositions. In the first place, the Court attributes to the appellants the contention, which it is said alone need be considered, namely, "that (1) the Mixed Claims Commission was without jurisdiction to make the awards of October 30, 1939". In the second place, the Court declares that the situation of the pending case "is clearly one of a continuing controversy between the United States and Germany although, paradoxically, neither Government is a party to the present suit". The Court referred to some diplomatic exchanges between the Department of State and the German Embassy in Washington and declared that they show that the proceedings in the present case are of a political nature.

The Court does not specifically deal with the fundamental contentions advanced by the appellants. They have not contended that there can be any proceeding in the nature of a judicial review of acts of an international commission. They have found no fault with any act of the Commissioners or the Umpire performed conformably to the terms of the Agreement of August 10, 1922. They have contended that the awards, said to have been made in favor of the Lehigh Valley Railroad Company and others were not valid awards made by the Commissioners nor by the Umpire; that the so-called awards are void; that they are not awards within the meaning of provisions of the Agreement of

1922, because they are not awards rendered conformably to the terms and requirements of the agreement; that they are simply individual acts of one Commissioner and the Umpire; and that, therefore, the payment of these so-called awards is not authorized by the Settlement of War Claims Act of 1928.

The appellants have taken the position that the courts have the power to determine whether statutory provision found in the Settlement of War Claims Act of 1928 would be properly or improperly executed, if action should be taken conformably to the prayers in the motion for summary judgment and in the motion of the defendants to dismiss the complaint and the bill of intervention. The Law of 1928, of course, contemplates the payment of valid awards only, that is, awards made in accordance with the terms of the Agreement of August 10, 1922. The appellants have contended that, in passing on questions with regard to the execution of the Law of 1928, the courts have the power to construe the pertinent international covenants, to determine whether or not valid awards were rendered through the acts of a single Commissioner and the Umpire. The Agreement of August 10, 1922, was incorporated by reference into the Settlement of War Claims Act of 1928. In construing and applying the statute, it is proper and necessary for the Court to construe the agreement.

JURISDICTION.

The facts involved in the cases relate to conflicting assertions of rights with reference to the fund established by the Act of March 10, 1928. That law and provisions of the Agreement of August 10, 1922, are definitive of those rights. The judgment of the United States Court of Appeals was rendered on June 3, 1940. Jurisdiction to issue a writ of certiorari is conferred by Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938; Section 347(a), Title 28, U. S. C.

REASONS FOR THE ALLOWANCE OF A WRIT.

The Court of Appeals has erroneously refused to construe and apply an important Federal statute, the Settlement of War Claims Act of 1928, provisions of which secure rights to the appellants and numerous other holders of valid awards, and has likewise refused to construe important international covenants, also definitive of those rights.

The Court of Appeals has erroneously attributed to the appellant, and has undertaken to refute, a contention to the effect that the Mixed Claims Commission, under the Agreement of August 10, 1922, was without jurisdiction to make certain awards, whereas, the contention of the appellants is that the so-called awards were unauthorized acts of a single Commissioner and the Umpire.

The Court misconstrued principles of law and judicial decisions relating to "political affairs", which under the Constitution are within the authority of the Executive Department of the Government.

In dealing with questions relating to "political affairs", the Court further erred in its conclusion that the pending cases are a "continuing controversy between the United States and Germany", and that a communication addressed by the German Charge d'Affaires *ad interim* to the Secretary of State shows beyond a doubt a "continuing interest of Germany in the proceedings" and the "political nature of the controversy".

In relying on some general principles relating to proceedings before international commissions and tribunals and relating to awards rendered by them, the Court failed to take account of the fact that the status and disposition of awards rendered by the Commission under the Agreement of August 10, 1922, are defined and provided for by the Settlement of War Claims Act of 1928, and further failed to take account of private property interests of claimants defined by that law and by international covenants.

The Court erroneously concluded that the proceeding

instituted in the District Court is not a "case" susceptible of judicial determination.

Issues have accordingly been raised with respect to the constitutional power and the duty of the Judiciary to construe international covenants, which create substantive rights in favor of the American citizens and in favor of the Government, and further to construe important statutory provisions which define important private rights and give effect to international covenants.

Questions have likewise been raised as to statutory authority vested in the Secretary of State by the War Claims Settlement Act to act in effect as a court of last resort with respect to the disposition of large sums of money, the statute having been construed by the decision affirmed by the Court of Appeals to have the effect of excluding all judicial examination into questions as to the propriety or impropriety of the execution of that law.

Finally, a question is also presented as to the proper use of the motion for summary judgment precluding a trial of the case on its merits.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued by this Court, directed to the United States Court of Appeals for the District of Columbia, commanding that court to certify and send to this Court, for its review and determination, a full and complete transcript of the record and all proceedings numbered and entitled on its docket, No. 7596, *Z. & F. Assets Realization Corporation, a Delaware Corporation; American-Hawaiian Steamship Company, Intervener, Appellants* v. *Cordell Hull, Secretary of State, and Henry Morgenthau, Secretary of the Treasury; Lehigh Valley Railroad Company, Intervener;* that the judgment of the Court below be reversed by this Court, and that petitioner have such other and further relief in the premises as to this Court may seem just.

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Hawaiian Steamship Company.

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Respondents.

BRIEF IN SUPPORT OF PETITION.

Opinions of the Courts Below.

The opinion of the District Court of the United States for the District of Columbia was rendered on January 3, 1940 (R. 295), and the opinion of the United States Court of Appeals for the District of Columbia was rendered on June 3, 1940.

Jurisdiction.

Jurisdiction to issue a writ of certiorari is conferred by Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938; Section 347(a), Title 28 U. S. C..

Statement of the Case.

The petition to which this brief is annexed contains a somewhat detailed statement of the nature of the case including summaries of the opinions rendered respectively by the Courts below.

Specification of Errors.

The United States Court of Appeals erred:

1. In affirming the decision of the District Court, although the Court of Appeals based its decision on a ground different from that on which the lower Court dismissed the actions filed by the plaintiff and the intervener-plaintiff;

2. In refusing to construe the Settlement of War Claims Act of 1928 and important international covenants incorporated into and given effect by that statute;

3. In misconstruing principles of law relating to "political affairs", which under the Constitution are within the scope of authority vested in the Executive Department of the Government, and in holding that the questions requiring judicial determination were of a political nature and therefore excluded from judicial cognizance;

4. In holding that the proceeding instituted in the District Court is not a "case" susceptible of judicial determination;

5. In misconstruing the functions of the Commission created by the Agreement of August 10, 1922, and in failing to take account of private property rights of American citizens derived from that Agreement and from the Settlement of War Claims Act of 1928, rights which are not affected by forms of procedure before the Commission which the Court discussed in considerable detail in its opinion.

POINT I.

The so-called awards rendered on October 30, 1939, are not awards rendered either by the Commissioners or by the Umpire in accordance with the provisions of the Agreement of August 10, 1922.

The Court of Appeals speaks of awards rendered in favor of the Lehigh Valley Railroad Company and others in 1939 as awards rendered by the "Commission". And on page 11 of its opinion the court seems to attribute to the appellants a failure to distinguish between undisputed valid awards, such as they and others were granted by the Commission or by the Umpire, and so-called awards, the validity of which the appellants have challenged, because they are not awards made conformably to the terms of the Agreement of August 10, 1922. The appellants have sought effectively to distinguish between clearly valid acts performed in accordance with the terms of the Agreement of 1922 and acts at variance with the Agreement. It is accordingly useful to indicate the manner in which awards can and must be made conformably to the requirements of the Agreement of 1922.

The Prescribed Method of Rendering Awards.

It is unnecessary to refer to general international practice with respect to the organization of international tribunals or commissions. The United States and Germany might have organized a tribunal or commission of three members by which cases could be decided by the unanimous or by the majority voice of the members. They chose to adopt another method of dealing with claims growing out of the war. The language of the Agreement of August 10, 1922, is so clear and precise that to attribute to it meanings against the letter is precluded by proper application of the familiar rule that it is not permissible to interpret when there is no need of interpretation. That is a rule of international law as well as a rule of the domestic law of the

United States applicable to the construction of treaty and statutory and constitutional provisions.

Vattel, *The Law of Nations,* Chitty's edition, Sec. 263, p. 244;
Pradier-Fodere, *Traite de Droit International Public,* Vol. II, Sec. 1179, p. 884; Sec. 1188, pp. 895-896;
Hall, *International Law,* 6th ed., Chap. 10, pp. 327-329;
Lake Country v. *Rollins,* 130 U. S. 662, 670-671;
The Amiable Isabella, 6 Wheaton, 1, 71, 72.

Cases can be decided by the joint action of the two Commissioners, or if the Commissioners disagree, by the sole decision of the Umpire. A single Commissioner can make no sole or partial disposition of a case. The Umpire has no functions unless the Commissioners disagree. When they do disagree, the Umpire acts independently as a court of last resort, so to speak.

"Account being taken of the explicit terms of the Agreement of 1922 with regard to the two methods by which cases could be decided, namely, by the concurrence of the Commissioners, or by the Umpire following disagreement by the Commissioners, it is interesting to note that the Court of Appeals recites in its opinion that, during the course of some deliberations in 1939, "the Umpire and the American Commissioner each expressed the view that the Commission's decision of October 16, 1930, had been induced by fraud". It is at least equally interesting to take note of the explicit statement found in the affidavit of Mr. Harold H. Martin (R. 85). He states that one of the grounds on which a rehearing was sought in 1931 with respect to the decision rendered by the Commission dismissing the claims of the Lehigh Valley Railroad and others in 1930 was "that the Commission had acted irregularly in arriving at its decision of October 16, 1930, in that the Umpire participated with the National Commissioners in their deliberations and thus deprived the United States of the inde-

pendent judgment of the National Commissioners uninfluenced by the opinion of the Umpire" (R. 85).

Clearly the Government of the United States was correct in 1931 with regard to its construction of the terms of the Agreement. The Umpire had no functions to discharge unless the Commissioners disagreed. He had no right to influence them; they had no right to undertake to influence him. However, it is not unnatural that counsel for the United States should not have succeeded in having the decision dismissing the claims declared to be a nullity. There was an agreement between two Commissioners in 1930. That in itself constituted a decision under the terms of the Agreement of 1922. That the United States was deprived of the independent judgment of the National Commissioners was a speculation. Indeed, that there was no such unfortunate situation might reasonably be inferred from the fact that all three recorded themselves to be in agreement.

If, as the Government of the United States properly contended in 1931, the Umpire has no functions unless the Commissioners disagree, then the so-called awards of 1939 in reality are the awards of the American Commissioner. If he has the power to dispose of cases involving vast sums of money, the German Commissioner has the same power.

In view of the contentions advanced in 1931 by counsel acting under the direction of the Department of State, it is of course not strange that counsel for the Secretary of State in the pending case should not now argue that the Umpire could participate in the proceedings or that a case can be decided by one Commissioner and the Umpire. Contentions were submitted by counsel in behalf of the Secretary of State to the effect that the questions involved in the case are of a "political nature", and that the Court had no power to pass on the questions of statutory and treaty interpretation raised by the complaints filed by the plaintiffs in the trial Court.

It is also significant that the American Commissioner in his opinion in which he undertook to justify the disposition

of the case by himself and the Umpire in the absence of the other National Commissioner relies on domestic cases concerned with private agreements relating to private arbitrations. These cases in no way involve international covenants, and they have no international aspects and no application even by way of analogy to the questions involved in the present case. Particular reliance is placed by the Commissioner on *Colombia* v. *Cauca Company*, 190 U. S. 524. The Government of the United States may have used its good offices in facilitating a private adjustment between Colombia and an American citizen, but the arbitral arrangement was a private one, and the suit instituted by Colombia to set aside the award in that arbitration was a private litigation. That litigation was finally disposed of by a decision to the effect that, since the terms of the private agreement in that private arbitration permitted a rendition of an award by two arbitrators, the award rendered was not void because the third arbitrator had not participated in it. The Court in formulating its decision was of course not guided either by international covenants or by rules or principles of international law. The same is true with respect to all the other private litigations cited by the Commissioner. An interesting point in *Colombia* v. *Cauca* is the action of the Court in revising the arbitral award to the extent that it was outside of the scope of power conferred on the arbitral Commission by the terms of the arbitral agreement.

POINT II.

A determination of the issues in the present case would not result in an interference by the Judiciary with political questions arising in the conduct of foreign relations.

The Scope of Political Questions.

Political questions within the exclusive competence of the Executive Department in the field of international relations obviously are those with which the Executive is concerned by virtue of authority delegated to him by the Constitution of the United States. The powers are stated in meagre language. But in determining their scope account must be taken of proper measures incident to their execution.

The President is Commander-in-Chief of the Army and Navy and of the militia of the several States when called into service. By virtue of that post the President may conclude armistice agreements and of course make agreements with co-belligerents in a war. Article II, Section 2, Clause 1.

He has the power to make treaties, by and with the advice and consent of the Senate. Article I, Section 2, Clause 2. That power obviously involves the authority to conduct incidental negotiations, and it is well established that it also confers some authority to construe treaties in dealing with problems entering into international relations, although the final interpretation of treaties in the United States pertains to the Judiciary; confers also the power by proper methods to abrogate treaties.

The President has the power to appoint American diplomatic officials and consular officers, and of course it is well established that he has authority to direct those whom he appoints with reference to the discharge of their official duties, including those relating to the protection of the lives and property of the American nationals abroad. *Ibid.*

It is the duty of the President to receive foreign diplo-

matic officers, and by virtue of that authority he conducts correspondence with them with reference to matters concerning which they address the Government of the United States in behalf of their respective Governments. Article II, Section 3. It follows that with the Executive Department rests the authority to accord or withhold recognition of new states or new governments from time to time.

Citations on Which the Court of Appeals Relies.

The pending cases were instituted for the purpose of preventing the payment of funds at variance with the provisions of the Settlement of War Claims Act. The Court has the power to construe that law. The law requires the payment of awards rendered conformably to the Agreement of August 10, 1922. The Court has the power to interpret the terms of the Agreement to determine whether the purported awards rendered in 1939 are such valid awards.

These justiciable questions are not political questions such as those dealt with in the cases cited in the opinion of the Court of Appeals, namely, the recognition by the Executive of foreign states and foreign governments; the protection of American citizens abroad; complaints by one government against another government in relation to infractions of treaties and other matters; the abrogation of treaties; determinations with respect to official acts of foreign governments. Nor do the issues in the pending case involve questions of domestic law such as the delegation of legislative power to the Executive; the lack of the authority of the courts to interfere when Congress passes an act in derogation of treaty stipulations; the refusal of American courts to enforce judicial process with respect to property of a foreign government as well as property of the United States. The appellants did not invoke judicial action to control the Executive in relation to such matters. It is believed that brief references to cases cited by the Court of Appeals will serve to show the nature of each

of the decisions rendered, and that they are in harmony with the above indicated views in relation to "political" questions and justiciable questions.

Oetjen v. *Central Leather Co.*, 246 U. S. 297.

This case was an action in replevin. It was held that acts of General Francisco Villa in seizing property in Mexico could not be examined and modified by a New Jersey court in replevin. The Court declared that it was well established that the Judiciary would be bound by the decision of the Executive with regard to the recognition of governmental authorities in foreign countries.

Lehigh Valley Railroad Co. v. *State of Russia*, 21 Fed. (2d) 396.

The Government of Russia sued the railroad company for losses sustained in 1916. The Imperial Russian Government having been extinguished, a question was raised as to the right to maintain a suit for damages. The Court said that it would be bound by the action of the Executive Department with respect to the question of recognition of a governmental regime in Russia.

Holzendorf v. *Hay*, 20 App. D. C. 576.

This is a case in which the Court very naturally declined to issue a writ of *mandamus* to the Secretary of State commanding him forthwith to institute "vigorous and proper proceedings against the Empire of Germany and the Emperor" thereof to recover damages in behalf of the petitioner.

Doe v. *Braden*, 16 How. 635.

This was an action of ejectment. While negotiations were pending between the United States and Spain for the cession of the Florida territory, the King of Spain made

a grant of a vast tract of land to a Spanish nobleman. The Government of the United States insisted that, before exchange of ratifications of the treaty of cession should take place, it should be declared by the treaty that the grant was annulled. That was done. The claimant contended that the annulment was void. The Court said that it must apply the treaty as the law of the land, and that it could not look into the question whether the King of Spain had a right to declare the annulment embodied in the treaty of cession.

Williams v. *Suffolk Insurance Company,* 13 Pet. 415.

In this case the Court asserted that it felt bound by conclusions which the Executive had reached with regard to an assertion of jurisdiction over the Falkland Islands by the Government of Buenos Aires.

The views heretofore expressed with regard to the scope of executive authority in dealing with international affairs seems to be clearly defined in the following passage from the opinion of the Court:

> "In the case of *Foster* v. *Neilson,* 2 Pet. 253, 307, and *Garcia* v. *Lee,* 12 Ibid., 511, this Court have laid down the rule that the action of the political branches of the government in a matter that belongs to them, is conclusive."

Sevilla v. *Elizalde,* decided April 15, 1940, App. D. C. —.

In this case it was held that the Court could not pass on qualifications of a resident Commissioner of the Philippine Islands in the United States partaking of the character of a foreign diplomatic representative.

Charlton v. *Kelly,* 229 U. S. 447.

This was an extradition case. Italy requested the sur-

render of an American citizen for trial. Over a long period the Italian Government had refused to surrender Italian subjects for trial in the United States. The Department of State was of the opinion that the treaty obligated each Government to surrender its own nationals, but the Executive had not seen fit to consider Italy's failure to do so an infraction of the treaty warranting the abrogation of the treaty by the United States. The Court referred to the well-known principle of law that the failure of one Government to observe treaty stipulations justifies the other contracting party in terminating the treaty, and the Court declared that, since the treaty had not been abrogated, the Court would enforce its provisions. The Court of course had no authority to give notice of the termination of the treaty which is a function of the Executive to be exercised in conjunction, perhaps, with the Senate.

United States v. *Curtis-Wright Export Corporation et al.*, 299 U. S. 304.

In this case it was held that Congress had not undertaken to make an improper delegation of legislative power to the President under the joint resolution of Congress of May 24, 1934, c. 365, 48 Stat. 811, by which certain authority was conferred upon the President with regard to embargoes on the shipment of arms to American republics.

The Court differentiated between cases involving legislation authorizing the President to act as the agent of Congress in dealing with purely domestic affairs and cases involving grants of authority to the President with reference to activities involving the affairs of other countries. It appears that the Court considered that, in cases of the latter kind, it was not necessary, in order to avoid delegation of legislative power, to prescribe, with respect to the ascertainment of facts, specified by Congress, the same kind of definite standards as must be fixed with reference to executive action in relation to purely domestic affairs.

United States v. Lee, 106 U. S. 196, 209.

Particular reference is made by the Court of Appeals to a passage in the opinion of the Supreme Court in which by way of illustration the Supreme Court referred to the immunity from judicial process of public ships and other property of foreign governments.

In this case the claimed privileged character of officials in charge of property taken by the United States was denied by the Court. Somewhat pertinent to issues in the pending case is the following passage in the Court's opinion:

> "No man in this country is so high that he is above the law. No officer of the law may set aside that law with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law, and are bound to obey it" (p. 220).

Marbury v. *Madison*, 1 Cranch 137, 165.

In the celebrated case in which the Supreme Court held that it had no power to issue a mandamus to the Secretary of State, that being an exercise of original jurisdiction not warranted by the Constitution, the Court in its opinion did enter into some discussion of acts of executive authorities exclusively within the competency of such authorities under the Constitution. It may be useful to quote in addition to the passage used by the Court of Appeals the following:

> "The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of executive, merely to execute the will of the president or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable" (p. 166).

However; the following passage would seem to be much more apposite to the pending case:

> "But when the legislature proceeds to impose on that

officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others."

Unrelated Diplomatic Correspondence.

Under date of October 3, 1939, the German Charge d'Affaires *ad interim* addressed a note to the Secretary of State objecting to the so-called awards rendered by the Umpire and the American Commissioner in 1939. In this note, it was said that these so-called awards were void because actions of the Umpire and the Commissioner were at variance with terms of submission in the Agreement of August 10, 1922 (R. 195).

It is a well established rule of international law, invoked on several occasions by the Government of the United States, that acts at variance with the terms of submission of an agreement are void. Governments, parties to an international agreement, of course have the power to nullify objectionable awards.

Ralston, *The Law and Procedure of International Tribunals*, pp. 42 *et seq.*;
Moore, *International Law Digest*, Vol. VII, pp. 59-62.

A few pertinent quotations from authorities bearing on the subject may be cited:

Kamarowsky, *Le Tribunal International* (Westman's translation), p. 355:

"The violation of the agreement to arbitrate by the tribunal in any respect whatever."

Rivier, *Principes du Droit des Gens*, Vol. II, p. 185:

> "* * * that the arbitrator has exceeded his powers or has not complied with the provisions of the *compromis*."

Hall, *A Treatise on International Law*, 5 ed., p. 363:

> "* * * when the tribunal has clearly exceeded the powers given to it by the terms of the instrument of submission."

A reply to this note from the German Embassy was made by the Secretary of State under date of October 18, 1939 (R. 217). The position which he took seems to be unique. He declined to enter into "a discussion of the various complaints and protests" contained in the note. The Secretary of State expressed confidence in the ability and integrity of the Umpire and the American Commissioner and he said that the action of the German Commissioner in retiring "was apparently designed to frustrate or postpone indefinitely the work of the Commission". The Secretary did not discuss the legal effect of the Commissioner's retirement.

A determination of the question whether acts of the distinguished Umpire and the American Commissioner were in conformity with terms of submission in the Agreement of August 10, 1922, would not be a reflection on their ability and integrity.

In a report made by Secretary of State Bayard on the *Pelletier and Lazare* cases, S. Ex. Doc. 64, 49 Cong. 2d Sess., he said:

> "The duty of the Executive to refuse to execute a decision which, in spite of the irreproachable character of the arbitrator, appears to be unjust and unfair, has been proclaimed many times by the Department of

State and sanctioned by the Supreme Court of the United States."

It may be observed that the Government of the United States did not impeach the ability or integrity of the King of the Netherlands, when it refused to carry out his decision in the Northeast Boundary case. And the Government of Great Britain did not refuse to discuss the objections made by the United States to that decision but joined in setting aside the award. Moore, *International Law Digest,* Vol. VII, p. 59.

Likewise, the Government of Venezuela did not refuse to discuss with the Government of the United States the latter's protest against the award rendered by the Umpire in the *Orinoco Steamship Company* case on the ground that the Umpire had departed from the terms of submission, but joined in having the Umpire's award passed upon by the Permanent Court of Arbitration at The Hague which declared the award to be a nullity on the ground of a departure from the terms of submission. *American Journal of International Law,* 1911, Vol. 5, p. 230; *Foreign Relations of the United States,* 1909, p. 617.

The Government of the United States refused to accept the award of the Commissioners in the Chamezal Arbitration with Mexico and requested Mexico to undertake to reach another settlement of the boundary controversy involved in that case which Mexico at the time declared its willingness to do. *Foreign Relations of the United States,* 1911, p. 598. The action taken by the Government of the United States involved no reflection on the ability and integrity of the distinguished Canadian jurist, E. Lafleur, who rendered the award.

When the Government of the United States undertook to have declared to be a nullity the awards rendered by the two Commissioners and the Umpire dismissing the claims of the Lehigh Valley Railroad Company and others in

1930, it was probably not intended to reflect on the ability and integrity of the three distinguished gentlemen who rendered the awards, Messrs. Boyden, Anderson and Kiesselbach (R. 80) even though it was charged that they had acted "irregularly" in that the Umpire, Mr. Boyden, participated with the National Commissioners in their deliberations and thus deprived the United States of the independent judgment of the National Commissioners uninfluenced by the opinions of the Umpire (R. 85). The charge evidently did imply that the two Commissioners had surrendered their independent judgment.

The German Government may or may not have learned of the filing of the present case after protest was made through diplomatic channels against acts of the Umpire and the American Commissioner. The Court of Appeals states that the exchange of communications brought the case of the appellants within the realm of political as distinguished from judicial questions. The case presented to the trial court is one in which the plaintiff undertook to secure proper application of the Settlement of the War Claims Act and to prevent action at variance with that law.

By passing on and protecting substantive rights created and secured by statutory provisions and treaty stipulations, the courts do not intervene in the conduct of foreign relations.

The Agreement of 1922 is concerned with both private and public interests, in that it specifies three classes of claims on which the Commission should pass: (1) "Claims of American citizens" with respect to damage to, or seizure of, property interests within German territory; (2) other claims of "nationals" of the United States with respect to injuries to person or property; (3) claims for damage to which the United States was subjected (R. 16).

The Court of Appeals evidently misconstrued the nature of the Agreement of August 10, 1922. The purpose of the Agreement was to pass on claims *against Germany*. No provision was made for the presentation of any claims against the United States by Germany. The Court in its

opinion refers to "claims of individual citizens presented by their respective governments", and says that the purpose of the agreement "was to ascertain how much was due from one government to the other on account of the demands of their respective citizens." No such purpose is recited in the preamble or articles of the Agreement.

The Settlement of War Claims Act of March 10, 1928, 45 Stat. 254, makes provision for the payment of claims against Germany, and sub-section 2(f) provides that "amounts awarded to the United States in respect of claims of the United States on its own behalf shall not be payable under this section."

In dealing with the question of the so-called "political" aspect of the pending case, it would assuredly be proper to take account of the American interest in the case as well as of the diplomatic notes having no relation to the case. The German Government is not concerned with the domestic machinery employed in interpreting statutes and treaties in the United States. It is not finally bound by any method, judicial or administrative, used here in reaching interpretations of international covenants; nor is the Government of the United States bound by an interpretation adopted by Germany through administrative or judicial action. If the two governments are unable to agree, a final decision binding on both can be reached only through the decision of an international tribunal. Diplomatic exchanges evidently terminated with the refusal of the Secretary of State to discuss questions raised. (R. 217).

The case instituted by the plaintiffs is concerned in the first instance with the proper interpretation and execution of a Federal statute, the Settlement of War Claims Act. The defendants are officials of the United States who are represented by other officials. The law to be applied by the court is the law of the United States. The funds in dispute are, as stated by the Court of Appeals, property of the United States and property which has been dedicated to specific purposes by Congressional enactment. If the funds

are misapplied the United States will suffer the loss, unless it can be passed on to American claimants.

The Court of Appeals in its opinion says that "paradoxically, neither government is a party to the suit." It is true that suit was not brought against Germany, and Germany has instituted no action. It is also true that an action against an officer of the Government of the United States to require the proper execution of a statutory duty is not a suit against the Government. *Miguel* v. *McCarl*, 291 U. S. 442. It would therefore seem that it is paradoxical to say that an action against an official intended to protect property rights secured by statutory provisions is excluded from judicial cognizance as one that involves solely political questions arising in the conduct of the Government's foreign relations. Furthermore, the Secretary of the Treasury is not concerned with the administration of affairs of that nature. And the Secretary of State has declared that he considered it to be improper for him to discuss questions raised whether acts purporting to dispose of large sums of money were taken in conformity with the controlling covenants.

Status of Funds Created by the Settlement of War Claims Act.

The Court of Appeals cites a number of cases in connection with conclusions stated as to the nature of the proceedings before the Commission created by the Agreement of August 10, 1922, and as to the status of the funds established by the Settlement of War Claims Act. In appraising a bearing of those cases it seems to be proper to take account of the Act of February 27, 1896, c. 34, 29 Stat. 32, Sec. 547, Tit. 31, U. S. C., which reads as follows:

> "Hereafter all moneys received by the Secretary of State from foreign governments and other sources, in trust for citizens of the United States or others shall be deposited and covered into the Treasury.

"The Secretary of State *shall determine the amounts due claimants,* respectively, from each of such trust funds, *and certify* the same to the Secretary of the Treasury, who shall, upon the presentation of the certificates of the Secretary of State, pay the amounts so found to be due.

"Each of the trust funds covered into the Treasury as aforesaid is hereby appropriated for the payment to the ascertained beneficiaries thereof of the certificates herein provided for." (Italics inserted.)

The early cases cited antedated that law. Furthermore, it is of course necessary, and solely necessary, in order to determine the status and proper disposition of the fund created by the Settlement of the War Claims Act, to look to the pertinent provisions of that law.

The District Court and the Court of Appeals in their respective opinions referred to *Mellon et al.* v. *Orinoco Iron Co.,* 266 U. S. 121. The lower Court said that the case did not involve the ownership of a claim which has been allowed, nor the propriety of an allowance of a claim but whether it has been allowed to the right party. The Court of Appeals declared that the sole issue in that case was the ownership of a specific fund received by the United States from Venezuela.

Orinoco Co., Ltd., et al. v. *Orinoco Iron Co.,* 296 Fed. 965, 54 App. D. C. 218, was an appeal from a decree of the Supreme Court of the District of Columbia establishing the equitable claim of the appellee to the sum of $56,250 on deposit in the Treasury of the United States, and to prevent the payment of that sum to the Orinoco Co., Ltd.

Under a protocol concluded between the United States and Venezuela, the Department of State had collected from Venezuela a sum of $385,000 in favor of the Orinoco Co.,

Ltd. and through its certificate had deposited that sum with the Secretary of the Treasury conformably to the requirement of the Act of February 27, 1896. *Treaties, Conventions, International Acts and Agreements,* Malloy, Vol. 2, p. 1887.

The Orinoco Iron Company had laid before the Department of State facts to show that it had an interest in the property which has been confiscated in Venezuela. The syllabus shows succinctly the disposition of the case by the Court of Appeals, which affirmed the decree of the trial court, p. 218:

> "Where complainant has an equitable right as against the other complainants in a fund paid, pursuant to the terms of the protocol of a foreign country, into the United States Treasury as a trust fund for the beneficiaries thereof, under Act of February 27, 1896 (Comp. St. Sec. 6668), complainant has a right to equitable relief, though the Secretary of State denied complainant's request to recognize its claim."

In *Mellon et al.* v. *Orinoco Iron Co.,* 266 U. S. 121, the decree of the Court of Appeals was affirmed by the Supreme Court speaking through Mr. Chief Justice Taft. It is clearly shown by the action of all three courts that the certificate of the Secretary of State was not controlling with regard to the payment of money in satisfaction of the claim, and that the courts are not debarred from concerning themselves with the disposition of funds of this character.

The case does not appear to involve the ownership of a claim. The successful litigant was not the owner of the claim, in whole or in part, since he had not even presented a claim to the Department of State for presentation to the Government of Venezuela. It is therefore not perceived that he could have had any ownership in the fund awarded. But because money was wrongfully awarded the Orinoco

Company, Ltd., and others, the Court imposed a trust on funds to which it considered the Orinoco Iron Company was entitled as compensation for losses actually sustained.

The Court of Appeals in its discussions of the distribution of awards of *international* commissions refers further to some cases involving questions relating to the procedure prescribed by Congress in dealing with cases passed upon by *domestic* commissions or boards created by statutes. The nature of these cases can be briefly indicated.

Comegys v. *Vasse*, 1 Pet. 193.

In Article IV of the Treaty of February 22, 1819, between the United States and Spain, the two Governments made a mutual renunciation of claims against each other. The Court held that a decision of the Commission was final, but it declared that it did not necessarily follow that the Court was debarred from passing on conflicting assertions of rights with reference to an amount awarded and that the decision of the Commission on the subject matter of conflicting assertions of right was beyond the scope of the Commission.

Williams v. *Heard*, 140 U. S. 529.

A domestic "Court of Commissioners" was established by Congress to make a distribution of funds received by the United States from England in satisfaction of the celebrated so-called Alabama Claims. No appeal from its decisions was provided for by Congress. Its actions were, of course, in no way governed by any international covenants. The question decided in this case was whether a claim passed to assignees in bankruptcy as a part of their estate. Cursorily examined, the generalities in the syllabus of the Court's opinion may convey an erroneous impression as regards the decision. The Court's declaration that the claimant had property rights, even before Congress made provision for the distribution of the Alabama award is in-

teresting. These rights, it was said, grew out of the losses sustained as a result of acts of British authorities.

These above mentioned cases were decided by domestic bodies, so to speak, from whose decisions Congress naturally did not undertake to make any provisions for appeals to the courts. Neither the constitution of these bodies nor the legal status of awards rendered by them was governed by any international covenants.

Distinction Between Judicial Power and Executive Power.

A strangely unfortunate situation exists at present with reference to acts disposing of vast sums of money belonging to the United States and dedicated to specific purposes by Congress.

If the action taken by executive and by judicial authorities be correct, there is no governmental authority that is capable of determining whether such acts shall result in an improper or proper disposition of these funds. The Secretary of State has declared that he would not discuss objections made to acts of the Umpire and the American Commissioner. On the other hand, the Secretary's legal representatives in the pending case have advanced the contention, sustained by the Court of Appeals, that questions raised with regard to acts of the Umpire and the Commission are "political" over which the courts have no power to pass. It is respectfully submitted that the machinery of Government is not so sadly impotent.

In determining whether these cases instituted before the District Court involve non-justiciable, "political" questions, it is of course necessary to take account of the specific problems in relation to which the action of the Court was invoked.

Suit was instituted to prevent a misapplication of a Federal statute, the Settlement of War Claims Act. The fundamental question therefore pertains to the interpreta-

tion and application of that statute. Mr. Justice Bailey did not declare that to be a political question. But he held that by the Settlement of War Claims Act Congress had through the terms relating to certification of awards vested in the Secretary of State powers which prevented a judicial determination of private rights secured by the Act of March 10, 1928, and the Agreement of August 10, 1922. It seems to be clear that the Secretary of State considered—correctly, it is submitted—that he was merely an agency of transmission of certifications of awards. That this is so appears to be clearly shown by the mechanical expedition with which the Department of State certified the numerous awards (R. 63-73, 110).

In construing the Settlement of War Claims Act, the second question requiring solution involves an interpretation of the pertinent clear provisions of the Agreement of August 10, 1922, to determine whether or not the statute would be properly or improperly executed, if the purported awards of 1939 should be paid. With the courts, of course, rest the final interpretation and application of Federal statutes. And the same is true with regard to stipulations of treaties. The courts have been concerned with such questions in hundreds of cases. Crandall, *Treaties; Their Making and Enforcement,* 2nd ed., pp. 466-634.

The plaintiffs did not petition the District Court to review any action of the Commission under the Agreement of August 10, 1922, or any act of the Umpire taken in conformity with the terms of the Agreement. They contended that some individual acts performed at variance with the agreement were not awards, the payment of which could properly be made under the Settlement of War Claims Act out of the fund created by that Act; that such acts performed in the absence of one Commissioner, were not even within the forms of the law, so to speak; and that they are void.

The third question relates to diplomatic correspondence cited in the opinion of the Court of Appeals. Governments,

parties to an international agreement, of course have the power to nullify objectionable awards, even in the absence of such exceptional circumstances as those of the present case, when one Commissioner undertook to act for both Commissioners, and the Umpire accepted such action as valid. Illustrations of the initiation of such action by the Government of the United States have already been cited. The Secretary of State refused to discuss complaints made as to irregularities of such acts of the Commissioner and the Umpire. The appellants in the present case did not ask the Court to interfere in any way in these diplomatic discussions. They did not attempt to have the Court direct the Secretary of State to consider these matters in conjunction with the complaining Government which he declined to do, intimating, it would seem, that such action on his part might be equivalent to intervening "directly or indirectly in the work of the Commission" (R. 217).

POINT III.

The proceeding instituted in the District Court is a "case" within the meaning of Article III, Section 2, Clause 1 of the Constitution.

The appellants, in support of their contention as to the power of the Court to pass on the issues raised in the present case, invoked Article VI, Clause 2, and Article III, Section 2, Clause 1, of the Constitution. With respect to the pertinent provisions of Article III the Court of Appeals in its opinion says:

> "Since the case of *Ware* v. *Hylton,* decided by the Supreme Court in 1796, the courts of this country have uniformly held that it is not for the judiciary to determine whether a treaty has been broken either by the legislature or the executive, and, accordingly, have consistently declined jurisdiction of such matters."

It is true, of course, that the Supreme Court of the United States has declared that, when Congress passes an act in derogation of a treaty, the courts will not interfere. The present case involves no such question. However, it is believed that the Supreme Court of the United States has never held that executive action in contravention of a treaty cannot be controlled by the Judiciary. In the present case it is sought to prevent executive action at variance with both statutory provisions and international covenants. The courts will prevent unauthorized acts with reference to matters arising under an extradition treaty. *Rice* v. *Ames*, 180 U. S. 371. The courts will control executive action for the purpose of upholding treaty stipulations relating to immigration. *Chew Heong* v. *United States*, 112 U. S. 536. The courts will prevent executive action in derogation of stipulations relating to customs duties. *Bantram* v. *Robertson*, 122 U. S. 116. The Courts will protect, against executive action, property rights, including inchoate or complete titles to land, guaranteed by treaty stipulations. *Soulard* v. *United States*, 4 Pet. 511. International Claims are property rights. *Phelps* v. *McDonald*, 99 U. S. 298; *Comegys* v. *Vasse*, 1 Pet. 193; *Metzger* case, *Venezuelan Arbitration of 1903, Ralston's Report*, p. 578. The Courts have controlled executive action in construing treaty stipulations relating to rights of citizenship. *Perkins* v. *Elg*, 307 U. S. 325.

The Court of Appeals cites *Muskrat* v. *United States*, 219 U. S. 346, 357. In this case the Court held to be unconstitutional an act of Congress to confer jurisdiction on the Court of Claims, and appellate jurisdiction of the Supreme Court of the United States, to pass on the constitutionality of some acts of Congress affecting rights of Indians.

It is not difficult to understand that the Court should not consider that such a function was not an adjudication of a controversy, and that the Court did not consider that it had advisory or revisionary powers to pass on congres-

sional statutes. In discussing judicial power conferred on the Supreme Court it was said in the opinion:

> "That judicial power, as we have seen, is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction."

For the reasons above set forth, it is respectfully prayed that this application for Writ of Certiorari be granted.

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